**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF OHIO**
**WESTERN DIVISION**

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| WENDY BROWN, Administrator,<br>Estate of Alexa Brown, minor daughter<br>of Warren and Wendy Brown, *et al*.,<br><br>Plaintiffs,<br><br>v.<br><br>WHIRLPOOL CORPORATION, *et al*.,<br><br>Defendants. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | Case No. 3:13-cv-01092<br><br>The Hon. James G. Carr |

**DEFENDANT WHIRLPOOL CORPORATION'S MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT**

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**INTRODUCTION**

In their Second Amended Complaint ("Complaint"), 58 Plaintiffs allege that they or their children contracted 28 unique and unrelated illnesses after being exposed to 30 different chemicals that allegedly are or were present in the environment in Sandusky County, Ohio. Plaintiffs claim they are responding to an alleged "cancer cluster" in the area involving children but the Complaint attempts to hold Whirlpool Corporation ("Whirlpool") solely responsible for all their disparate alleged illnesses. Critically, the Complaint ignores multiple federal, state, and local environmental and health agency reports and studies that have found there is no known environmental cause—much less a common source of exposure to any carcinogen—of the reported childhood cancer incidents in Sandusky County.[1] Moreover, Plaintiffs' alleged myriad illnesses—ranging from low sperm count to slow learning to diverticulitis to cancers of every type—bear almost no relation to Plaintiffs' allegation that there is a cancer cluster in the area.

Undeterred by the federal, state, and local agencies' repeated failures to find any environmental cause of the reported incidents of childhood cancer, Plaintiffs' lawyers have turned a blind-eye to the agencies' findings and have embarked on an unjustified campaign to blame the area's largest employer and manufacturer, Whirlpool, for every childhood cancer or other health issue experienced by 58 different Plaintiffs, including many adult Plaintiffs who indisputably are not part of any alleged childhood cancer cluster. The result is a Complaint that

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[1] For example, the Ohio Department of Health ("ODH") and the Ohio Environmental Protection Agency ("Ohio EPA") studied 14 sites for environmental contamination in connection with their study of childhood cancer in Sandusky County, and they did not identify any common cause(s). (Compl. ¶ 85; *see also* ODH *et al.*, *Childhood Cancer among Residents of Eastern Sandusky County*, Oct. 30, 2009, attached as Ex. 1.) After studying the childhood cancer cases in the county, ODH concluded that "[t]here were no exposures or variables that were common to the 21 children with cancer who participated in this profile." (ODH *et al.*, *Childhood Cancer in Eastern Sandusky County, 1996-2010: A Profile of 21 Cases*, May 26, 2011, at 4, attached as Ex. 2.)

invites the Court to make dozens of unsupported inferences that are directly contradicted either by the documents Plaintiffs attached to their Complaint or by other public documents (*e.g.*, federal, state, and local agency reports) of which this Court can and should take judicial notice.[2]

**Plaintiffs Do Not Allege They Were Actually Exposed to Any Hazardous Substances**

Plaintiffs' claims for personal injuries and wrongful death fail because, among other reasons, they plead no facts suggesting they personally were exposed to any substance found at any identified site—whether Whirlpool Park, the Whirlpool Plant, the Clyde City Dump, the Amert Lagoon Site, Grover-Miller Dump Site, Green Creek Dump Site, Leach Dump Site, McGrath Dump Site, Shaw Road Dump Site, or the Golembiowski Dump Site (the "Alleged Sites")[3]—or any unidentified site. Plaintiffs have likewise failed to plead exposure in a quantity capable of causing any of the dissimilar illnesses alleged in the Complaint. Although Plaintiffs allege that Whirlpool caused the release of chemicals into the atmosphere around Clyde, Plaintiffs fail to plead any plausible factual basis from which the Court could infer that Plaintiffs were exposed to any of these chemicals or that the alleged releases caused their disparate illnesses. *See, e.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("Where a complaint pleads facts

[2] The Court should take judicial notice of the government documents attached to this motion because they are central to Plaintiffs' allegations, are public records, are not subject to reasonable dispute, and "merely 'fill in the contours and details'" of the Complaint. *See Armegau v. Cline*, 7 F. App'x 336, 344 (6th Cir. 2001) ("We have taken a liberal view of what matters fall within the pleadings for purposes of Rule 12(b)(6)." (citation omitted)); *Woods v. Willis*, No. 3:09CV2412, 2010 WL 3808279, at *7 n.7 (N.D. Ohio Sept. 27, 2010) (Carr, J.); *Martin v. Behr Dayton Thermal Prods., Inc.*, No. 3:08cv00326, 2009 WL 8403651, at *3 (S.D. Ohio Apr. 22, 2009) (finding the court could consider "public records that are available from the EPA" without converting the motion to dismiss into one for summary judgment).

[3] Only one Plaintiff alleges that she visited Whirlpool Park, but she alleges no facts showing an exposure pathway or quantifying any alleged exposure. (Compl. ¶¶ 32, 207.) No other Plaintiff alleges visiting any of the Alleged Sites. (*Id.* ¶¶ 1-31, 33-206, 208-92.)

that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." (internal quotation marks omitted)).

**Governmental Air Studies Debunk Plaintiffs' Claims**

Plaintiffs' allegations regarding Clyde's air quality are demonstrably false and cannot form the basis of a good-faith claim against Whirlpool. The Ohio EPA publicly stated that Clyde's ambient air poses no human health risk, after having specifically tested for the volatile organic compounds ("VOCs") that Plaintiffs contend caused their injuries.[4] The ODH has described benzaldehyde, which some Plaintiffs allege was detected in their attics and caused childhood cancers, as a non-carcinogenic substance that is found "[e]verywhere," including in "dust particles in the air."[5]

**Governmental Studies Have Not Identified a Cause of Plaintiffs' Alleged Illnesses**

Instead of pleading facts showing how any particular Plaintiff was exposed to any substance known to cause that Plaintiff's particular illness <u>and</u> in a manner and amount sufficient to cause that illness, Plaintiffs simply rely on reports and studies of Clyde's allegedly elevated childhood cancer rates. This alone cannot provide a platform to claim that Whirlpool caused Plaintiffs' list of unrelated adult and childhood health issues. The Sixth Circuit recently rejected this approach to environmental toxic exposure claims, finding that studies reporting the incidence of cancer are not "a substitute for individualized exposure data." *Baker v. Chevron U.S.A. Inc.*, Nos. 11-4369, 12-3995, 2013 WL 3968783, at *16 (6th Cir. Aug. 2, 2013) (affirming

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[4] Ohio EPA, *Air Quality Report for Clyde and Green Springs*, May 14, 2010, at 3, attached as Ex. 3 ("Ohio EPA detected no elevated levels of VOCs or heavy metals" and concluded "no elevated levels of pollutants" existed that "would indicate a cause for public health risk concerns.").

[5] ODH, *Benzaldehyde: Answers to Frequently Asked Health Questions*, May 2013, at 1, attached as Ex. 4.

dismissal of the plaintiffs' medical monitoring claims due to failure to connect plaintiffs' alleged injuries to a benzene plume beneath a refinery site). The Sixth Circuit's *Baker* analysis applies here because no study identifies any particular environmental source or cause of cancer among Clyde's residents. *Cf. id*. ("Most importantly, [the cancer study] did not find that the plume or its [alleged] soil vapors were the reasons for the increased cancer rates."). To the contrary, ODH concluded that "there is no evidence of significant environmental contamination in the Clyde area nor evidence of a 'completed exposure pathway' currently linking any cancer-causing chemicals in the environment with any of the individual or collective childhood cancer cases in the Clyde area." (ODH, *Evaluation of Ohio EPA Soil Sampling in Support of the Clyde and Eastern Sandusky County Childhood Cancer Investigation*, July 28, 2011, at 5, attached as Ex. 5.)

With respect to Plaintiffs' property damage claims, the Complaint also fails to allege any facts that, if true, would show that Plaintiffs' properties have been contaminated with chemicals from any Alleged Site, much less that Whirlpool contaminated any of their properties. Further, environmental "stigma damages" are not allowed under Ohio law.

In short, Plaintiffs' Complaint contains a broad collection of unrelated adult and childhood health claims that are unconnected to a list of miscellaneous substances allegedly present in the environment. It invites the Court to fill in the blanks and assume each Plaintiff was exposed to a particular substance in a manner and quantity sufficient to cause illness, by some unidentified act or omission attributable to Whirlpool. For these reasons and those explained below, the Complaint is fatally deficient and nothing more than a request to launch an enormous fishing expedition and an attempted end-run on the rigorous analyses applied by the governmental agencies that already have looked for and been unable to find the cause of the

alleged increased childhood cancer rates. Because Plaintiffs are "armed with nothing more than conclusions" masquerading as "plausible claim[s] for relief," the Court should dismiss their claims. *Iqbal*, 556 U.S. at 679.

## ARGUMENT

### I. STANDARD OF REVIEW

A "plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (alteration in original). A complaint must set forth "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678 (internal quotation marks omitted). That standard "asks for more than a sheer possibility that a defendant has acted unlawfully" and requires more than facts that are "merely consistent" with liability. *Id*. Although the Court must presume all well-pled factual allegations are true, that "tenet . . . is inapplicable to legal conclusions." *Id.*; *see also New Albany Tractor, Inc. v. Louisville Tractor, Inc.*, 650 F.3d 1046, 1050 (6th Cir. 2011) ("[C]onclusory legal allegations that do not include specific facts necessary to establish the cause of action" are insufficient.).

## II. PLAINTIFFS FAIL TO STATE PLAUSIBLE CLAIMS FOR PERSONAL INJURY AND WRONGFUL DEATH

### A. The Court Should Dismiss Plaintiffs' Negligence and Recklessness-Based Wrongful Death and Personal Injury Claims (Counts 1, 2, 7 & 8)[6]

A plaintiff asserting a personal injury or wrongful death claim based on negligence must allege (1) the existence of a legal duty, (2) the defendant breached that duty, and (3) the breach of duty proximately caused injury or death. *Kerner v. Terminix Int'l Co., LLC*, No. 2:04-CV-735, 2008 WL 163609, at *4 (S.D. Ohio Jan. 7, 2008) (citing *Mussivand v. David*, 544 N.E.2d 265, 270 (Ohio 1989)). Plaintiffs fail to allege facts in support of the second or third elements.

#### 1. Plaintiffs Fail to Allege Facts Showing Whirlpool Breached a Duty

To sufficiently allege that Whirlpool breached a duty to Plaintiffs, they must allege facts showing that Whirlpool improperly disposed of or released one or more of the toxic substances identified by Plaintiffs. *Kerner*, 2008 WL 163609, at *4. They have not done that.

First, despite acknowledging that Whirlpool does not use benzaldehyde in its core manufacturing processes, Plaintiffs allege that benzaldehyde is present in the attic dust of five Clyde homes. (Compl. ¶¶ 164-66; *see also* Compl. Ex. A.) The Court cannot infer, as Plaintiffs suggest, that Whirlpool caused the presence of benzaldehyde in their homes. *See Mitchell v. Cmty. Care Fellowship*, 8 F. App'x 512, 513 (6th Cir. 2001) (finding the court is "not required to accept non-specific factual allegations and inferences"); *Veasy v. Teach for Am., Inc.*,

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[6] Reckless conduct is "not a separate cause of action, but a level of intent which negates certain defenses which might be available in an ordinary negligence action." *Cincinnati Ins. Co. v. Oancea*, No. L-04-1050, 2004 WL 1810347, at *3 (Ohio Ct. App. 2004). Accordingly, the Court should dismiss Counts Seven and Eight. *See Bradley v. City of Cleveland*, No. 1:11 CV 781, 2012 WL 775106, at *3 (N.D. Ohio Mar. 7, 2012) ("As willful, wanton, and reckless conduct does not stand as ground for relief in Ohio, it must be dismissed."). And even if "reckless conduct" were a stand-alone claim, Plaintiffs' claims still fail because they do not plead facts suggesting Whirlpool knew of any risk of harm, much less consciously disregarded that risk. *See Anderson v. Massillon*, 983 N.E.2d 266, 273 (Ohio 2012).

868 F. Supp. 2d 688, 692 (M.D. Tenn. 2012) (finding courts "will not engage in 'gap-filling' to draw unreasonable inferences from a pleading"). This is particularly true here because, according to ODH, benzaldehyde is "[e]verywhere," including in "dust particles in the air," and is used in foods, fragrances, pharmaceuticals, personal care items, and as a solvent. (Compl. Ex. D-1 at 2; Ex. 4.)[7] The only reasonable inferences are that benzaldehyde should be found in most homes because it is common everywhere and that Plaintiffs' benzaldehyde likely derived from numerous household sources. And there are no facts from which the Court could infer that Whirlpool produced the benzaldehyde found in Plaintiffs' homes.

Second, Plaintiffs' allegations regarding Whirlpool's VOC emissions and the transport of pollutants "through the wind" are implausible. Plaintiffs generally allege that Whirlpool's factory improperly or unlawfully released airborne pollutants, but the government records to which Plaintiffs refer contradict their allegations. (Compl. ¶ 70.) In fact, during a 2009-2010 study, Ohio EPA found "no elevated levels of VOCs" or any "elevated levels of pollutants that would indicate a cause for public health risk concerns." (Ex. 3 at 3 (showing "that the VOC levels . . . were considered to be protective of human health").) Moreover, Plaintiffs' own consultant found no identifiable pattern in the testing he conducted of any substance other than benzaldehyde. (Compl. Ex. A at 9-12; Compl. ¶ 167.) There simply is no factual allegation from which the Court could infer that Whirlpool polluted the air in Sandusky County at a level that posed a

[7] "[W]hen a written instrument contradicts allegations in the complaint to which it is attached, the exhibit trumps the allegations." *Williams v. CitiMortgage, Inc.*, 498 F. App'x 532, 536 (6th Cir. 2012).

danger to human health, especially where Plaintiffs' own testing and several governmental agency studies failed to make any such finding or connection.[8]

Third, Plaintiffs' suggestion that Whirlpool disposed of manufacturing waste at various times and locations over many decades, in undisclosed amounts, and without any indication as to what was dumped, does not state a plausible basis from which the Court can infer Whirlpool breached any legal duty to each Plaintiff. Although Plaintiffs generically allege that (a) "[b]arrels of liquid Teflon were recently found on the Weiker property" (*id.* ¶ 152), (b) Whirlpool "dumped fill material" containing "the same pollutants and chemicals" found at Whirlpool Park on an unidentified Weiker property "several years ago" (*id.* ¶ 153), and (c) Whirlpool dumped materials at the Whirlpool Park (*id.* ¶¶ 141-42), those nonspecific allegations, even if true, are not sufficient to show Whirlpool breached any legal duty to Plaintiffs.

**2. Plaintiffs Fail to Plead Facts Showing that Whirlpool Proximately Caused Their Injuries**

To state a "prima facie case involving an injury caused by exposure to . . . [a] toxic substance, a claimant must establish (1) that the toxin is capable of causing the medical condition or ailment (general causation); and (2) that the toxic substance in fact caused the claimant's medical condition (specific causation)." *Terry v. Caputo*, 875 N.E.2d 72, 77 (Ohio 2007); *see also Pluck v. BP Oil Pipeline Co.*, 640 F.3d 671, 676-77 (6th Cir. 2011). General causation is shown by pleading and proving "that exposure to a substance can cause a particular disease."

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[8] By way of another example, ODH reported that the "[r]esults of the four analyses suggest cancer clustering in the eastern/northeastern portion of Sandusky County," but it did not conclusively show a cancer cluster or conclude that an "external source" caused a cluster. (Comprehensive Cancer Center *et al*., *Investigation of Potential Clustering of Invasive Cancer among Children, Adolescents, and Young Adults in Sandusky County*, *Ohio*, *1996-2006*, May 28, 2009, at 20, attached as Ex. 6.) Moreover, Plaintiffs expressly admit in the Complaint that ODH and Ohio EPA "conclud[ed] that there was no common source of exposure to carcinogens common to all children affected in the cancer cluster." (Compl. ¶ 85.)

*In re Heparin Prods. Liab. Litig.*, 803 F. Supp. 2d 712, 724 (N.D. Ohio 2011) (emphasis in original). Specific causation requires a plaintiff to "show that he was exposed to the toxic substance and that the level of exposure was sufficient to induce the complained-of medical condition." *Valentine v. PPG Indus., Inc.*, 821 N.E.2d 580, 588 n.1 (Ohio Ct. App. 2004), *aff'd sub nom. Valentine v. Conrad*, 850 N.E.2d 683 (Ohio 2006).[9] Plaintiffs fail to plead any facts to support either general causation or specific causation. (*See generally* Compl. ¶¶ 1-208.)

First, each Plaintiff alleges only that he or she (or one of his or her children) developed cancer or some other illness (*id.* ¶¶ 176-208), but Plaintiffs fail to plead facts showing that they have been exposed to any chemical identified in the Complaint, much less that the level of exposure was sufficient to cause their illness.[10] *See In re Heparin Prods. Liab. Litig.*, No. 3:09HC60137, 2010 WL 547322, at *2-3 (N.D. Ohio Feb. 9, 2010) (Carr, J.) (dismissing wrongful death claim where the plaintiff failed to allege facts showing that the product's failings were the cause of the death; "[S]ummarily stat[ing] that decedent's injuries and death resulted '[a]s a direct and proximate result' of Gambro's actions . . . is no more than 'formulaic recitation of the elements of a cause action,' and is "insufficient to survive a motion to dismiss." (quoting *Twombly*, 550 U.S. at 555)); *Pluck*, 640 F.3d at 679 ("[I]t is well-settled that the mere existence of a toxin in the environment is insufficient to establish causation.").

[9] *Accord Baker*, 2013 WL 3968783, at *15 (the mere existence of a toxin in the plaintiff's environment is insufficient to show specific causation "without proof that the level of exposure could cause the plaintiff's symptoms"); *In re TVA Ash Spill Litig.*, 805 F. Supp. 2d 468, 482 (E.D. Tenn. 2011); *Avila v. Willits Envtl. Remediation Trust*, Nos. C 99–3941 SI, C 01–266 SI, C 06–2555 SI, 2009 WL 1813125, at *5 (N.D. Cal. June 18, 2009).

[10] The lifetime risk of developing cancer is 41% for all U.S. residents. (*See* National Cancer Institute, *SEER Cancer Statistics Review 1975-2009*, April 2012, at 1, *available at* http://seer.cancer.gov/csr/1975_2009_pops09/results_merged/topic_lifetime_risk_diagnosis.pdf, attached as Ex. 7.) Exposures to environmental pollutants account for just 2% of cancer deaths. (Compl. Ex. C at 1.)

Indeed, the Complaint contains no well-pled facts showing that any Plaintiff other than Ms. Fouke (a) ever visited any Alleged Site, (b) was exposed to the chemicals buried in those sites, or (c) was exposed to the benzaldehyde present in certain Plaintiffs' attics or the Teflon that supposedly was found on the "Weiker property." (Compl. ¶¶ 176-208.) And Plaintiffs do not—because they cannot in good faith—allege any facts showing that chemicals contaminated their drinking water. (*See, e.g.*, Ex. 1 at 26 ("Results of the sampling did not identify any components of drinking water that suggest carcinogenic health concerns.").)

Second, Plaintiffs' own allegations and references to government documents confirm that they have not pled general or specific causation. For example, Plaintiffs' own pre-litigation testing revealed benzaldehyde levels ranging from 18.4 mg/kg to 62.2 mg/kg, which is far less than the current U.S. EPA regional screening level ("RSL") for residential soil. (Compl. ¶ 168; Ex. 4 at 2.) And the U.S. Agency for Toxic Substances and Disease Registry publicly stated that Plaintiffs' data do not support their claims. (*See* Letter from R. Gillig to S. Wolfe, June 14, 2013, at 1, *available at* http://www.epa.gov/Region5/cleanup/easternsandusky/pdfs/20130614-atsdr-letter-on-attic-dust.pdf, attached as Ex. 8 ("The data cannot be used to establish a completed human exposure pathway or to determine health risk and cannot help to evaluate cancer risk in the household or community.").) Moreover, benzaldehyde is found "[e]verywhere" and is recognized as a safe substance by state and federal authorities. (*See, e.g.*, Ex. 4.)

Third, Plaintiffs' exhibits discussing benzaldehyde negate their allegation that "benzaldehyde is a suspected carcinogen and known mutagen" (Compl. ¶ 170), and undermine any notion that benzaldehyde can cause their complained-of illnesses.[11] For instance, Plaintiffs'

[11] ODH has reported that benzaldehyde is not "a Known or Reasonably Anticipated human carcinogen," is considered by the U.S. Food and Drug Administration to be "generally regarded

expert admits that "[b]enzaldehyde has not been well studied for human health effects." (Compl. Ex. A at 9.) By way of another example, Plaintiffs' Exhibit B is an obsolete 2002 memorandum from the New Jersey Department of Health and states that whether benzaldehyde "poses a cancer or reproductive hazard needs further study."[12] (Compl. Ex. B at 2.) And neither of the benzaldehyde studies Plaintiffs attach to their Complaint states that benzaldehyde is a known carcinogen or mutagen or is capable of causing any of Plaintiffs' alleged illnesses.[13] (Compl. Exs. C-1 & D-1.); *cf. Baker*, 2013 WL 3968783, at *10 (striking expert testimony and granting judgment in favor of the defendant because "there was no consistent support in the studies that benzene exposure significantly increases the risk of developing plaintiffs' various diseases").

Similarly, Plaintiffs' Exhibit F—a document published by the American Cancer Society titled "Teflon and Perfluorooctanoic Acid (PFOA)"—states unequivocally that "Teflon itself is not suspected to cause cancer." (Compl. Ex. F at 1.) This negates any inference that Teflon caused any Plaintiff's cancer.

Finally, Plaintiffs do not even allege Whirlpool emitted VOCs at a level posing a danger to human health.[14] Although Plaintiffs suggest that Ohio EPA found "unacceptable levels" of

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as [a] safe" food additive, and is listed by the Environmental Working Group on the low end of "overall hazard" scale. (*See* Ex. 4 at 2; *see also* 21 C.F.R. § 182.60.)

[12] The New Jersey Department of Health published its current Hazardous Substance List in 2010—more than eight years after it published Plaintiffs' Exhibit B—and New Jersey does not list benzaldehyde as a known carcinogen or mutagen. (NJ Dep't of Health, *2010 Right to Know Hazardous Substance List*, at 34, attached as Ex. 9.)

[13] The first study merely concluded that benzaldehyde "can cause small but significant increases in DPX [DNA-protein cross-links] formation in cultured human lymphoma cells" but that "the likelihood of [benzaldehyde] reaching blood levels necessary to induce DPX formation is very low." (Compl. Ex. C-1 at 14.) The second study merely found mutations in flies that were given various concentrations of benzaldehyde. (Compl. Ex. D-1 at 1, 4.)

[14] Plaintiffs' Complaint acknowledges that the risks posed by VOCs vary widely and some have "no known health effect." (Compl. Ex. H at 1.)

certain chemicals in Whirlpool's ambient air emissions in 2009 and 2010 (Compl. ¶ 158), that is misleading. Ohio EPA actually found that the air quality in Clyde presented "<u>no elevated levels of pollutants that would indicate a cause for public health risk concerns</u>" based on its testing. (Ex. 3 at 3 (emphasis added).)

For these reasons, the Court should dismiss Plaintiffs' First, Second, Seventh, and Eighth Claims for Relief. *See, e.g.*, *Pinares v. United Techs. Corp*., No. 10-80883-CIV, 2011 WL 240522, at *4 (S.D. Fla. Jan. 19, 2011) (dismissing claim where the plaintiffs alleged only that they developed cancer "as a direct and proximate result of [Defendant's] release of hazardous materials" but did "not allege that any contaminant touched their property" or "provide any factual basis for the allegation that Defendant is responsible for Plaintiff's cancer" (alteration in original)); *In re Heparin*, 2010 WL 547322, at *3 (dismissing claims where the plaintiff failed to allege the defendant's product cause the decedent's injury).

**B. Plaintiffs Fail to Plead Facts Sufficient to Support Their "Strict Liability" and "Ultra-Hazardous Activity" Claims (Counts 3 & 4)**

To state a strict liability claim Plaintiffs must plead that Whirlpool "carries on an abnormally dangerous activity" and that Plaintiffs suffered "harm . . . resulting from the activity." Restatement (Second) of Torts § 519 (1977); *Hurier v. Ohio Dep't of Transp.*, No. 01AP-1362, 2002 WL 2005755, at *3 (Ohio Ct. App. Sept. 3, 2002) (strict liability attaches when "one is using one's land or property for activities, which are unreasonably hazardous"). Plaintiffs have not done that.

"An abnormally dangerous activity is one 'that cannot be maintained without injury to property, no matter what care is taken." *State ex. rel. R.T.G., Inc. v. State*, 780 N.E.2d 998, 1010 (Ohio 2002) (citation omitted). Whether an activity is abnormally dangerous depends on these factors:

> (a) existence of a high degree of risk of some harm to the person, land or chattels of others; (b) likelihood that the harm that results from it will be great; (c) inability to eliminate the risk by the exercise of reasonable care; (d) extent to which the activity is not a matter of common usage; (e) inappropriateness of the activity to the place where it is carried on; and (f) extent to which its value to the community is outweighed by its dangerous attributes.

Restatement (Second) of Torts § 520 (1977) ; *Abraham v. BP Exploration & Oil, Inc.*, 778 N.E.2d 48, 53-54 (Ohio Ct. App. 2002); *Boggs v. Landmark 4 LLC*, No. 12-614, 2013 WL 944776, at *2 (N.D. Ohio Mar. 11, 2013) (while "not elements of a strict liability claim," these factors "are guidelines"). "For many courts, the analysis of whether an activity is abnormally dangerous revolves around factor (c), whether the activity can be made safe through the exercise of reasonable care." *Fletcher v. Conoco Pipe Line Co.*, 129 F. Supp. 2d 1255, 1261 (W.D. Mo. 2001).

Here, Plaintiffs allege only that Whirlpool disposed of chemicals "in a dangerous" and "ultra-hazardous way."[15] (Compl. ¶¶ 221, 228.) These allegations do not show why or how Whirlpool's "manufacturing process" is abnormally dangerous. Although Plaintiffs need not plead and prove each Restatement factor, they must allege more than legal conclusions. *See Bd. of Cnty. Comm'rs of Cnty. of La Plata, Colo. v. Brown Grp. Retail, Inc.*, 598 F. Supp. 2d 1185, 1196 (D. Colo. 2009) (dismissing strict liability claim for failure to allege facts relevant to the Restatement factors); *Ganton Techs., Inc. v. Quadion Corp*., 834 F. Supp. 1018, 1020 (N.D. Ill. 1993) (dismissing strict liability claim because "[t]here is no basis for believing any risk of harm [from PCBs] could not be eliminated by the use of reasonable care").

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[15] Courts applying Ohio law have typically limited strict liability for ultra-hazardous or abnormally dangerous activities to cases involving explosives and atomic energy. *See Darton Corp. v. Uniroyal Chem. Co*., 893 F. Supp. 730, 740 (N.D. Ohio 1995). There is no reason to extend the doctrine based on Plaintiffs' bare allegations in this case.

Plaintiffs' only factual allegations that arguably bear on Plaintiffs' claims regarding Whirlpool's manufacturing process are their allegations that Whirlpool burned various materials and used "smoke stacks that were too short" and a system without regenerative thermal oxidizers.[16] (Compl. ¶¶ 51-59.) Even accepting these bare allegations as true, Plaintiffs' claims fail because they do not sufficiently allege harm resulting from Whirlpool's emissions of VOCs. Plaintiffs conclusorily allege that they have "sustained permanent personal injuries" "[a]s a direct and proximate result of Whirlpool's ultra-hazardous activities" and that Whirlpool has "kill[ed]" certain Plaintiffs' children, but they do not allege facts showing that Whirlpool's VOC emissions contaminated the air quality of Clyde, much less in a way injurious to human health. (*Id*. ¶¶ 221-22, 229, 231.) These conclusory allegations not only are insufficient under *Twombly* and *Iqbal*, but they are belied by Ohio EPA's findings. (*See* Argument, Part II.A.2, *supra*.)

Accordingly, the Court should dismiss Plaintiffs' Third and Fourth Claims for Relief.[17]

### C. The Court Should Dismiss Plaintiffs' Trespass-Based Wrongful Death and Personal Injury Claim (Count 5)

To state a trespass claim Plaintiffs must allege "(1) an unauthorized intentional act, and (2) entry upon land in the possession of another." *Lally v. BP Prods. N. Am., Inc.*, 615 F. Supp. 2d 654, 660 (N.D. Ohio 2009). The intrusion must be physical. *Uland v. S.E. Johnson Cos.*, No. WM-97-005, 1998 WL 123086, at *6 (Ohio Ct. App. Mar. 13, 1998). If the trespass is caused by airborne pollutants, a plaintiff must also show "<u>substantial</u> physical damage to the land or

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[16] Because Plaintiffs imply that a system with regenerative thermal oxidizers would have eliminated the emissions (Compl. ¶¶ 54, 56, 59), Restatement factor (c)—the key factor according to most courts—does not apply here.

[17] Counts Three and Four are duplicative of each other, the only difference being that Plaintiffs refer to Whirlpool's activities as "dangerous" in their third claim and "ultra-hazardous" in their fourth claim. Plaintiffs cannot assert "two separate counts alleging the exact same claims." *Smith v. Bd. of Trs. Lakeland Cmty. Coll.*, 746 F. Supp. 2d 877, 899 (N.D. Ohio 2010).

substantial interference with [his] reasonable and foreseeable use of the land." *Baker*, 2013 WL 3968783, at *13 (emphasis added); *Williams v. Oeder*, 659 N.E.2d 379, 382 (Ohio 1995); *see Chance v. BP Chems., Inc.*, 670 N.E.2d 985, 993 (Ohio 1996) ("[S]ome type of physical damages or interference with use must be shown in an indirect invasion situation."). *De minimis* interferences are insufficient. *Baker*, 2013 WL 3968783, at *14. Also, a plaintiff must plead that "the trespass proximately caused the harm for which compensation is sought." *Baker v. Chevron USA, Inc.*, No. 1:05-CV-227, 2009 WL 3698419, at *3 (S.D. Ohio Nov. 4, 2009), *aff'd* 2013 WL 3968783 (6th Cir. Aug. 2, 2013).

Here, Plaintiffs' Fifth Claim for Relief alleges only that "Whirlpool's manufacturing processes, including the disposal of chemicals, constituted a trespass on plaintiffs' property" and that these "trespasses have resulted in harm." (Compl. ¶¶ 233-35.) Plaintiffs fail to allege facts showing that Whirlpool contaminated their properties.[18] *See, e.g.*, *Pinares*, 2011 WL 240522, at *2-4 (dismissing trespass claim where the plaintiffs failed to "allege that any chemical or other substance from Defendant's property has contaminated or otherwise affected their property").

Although Plaintiffs allege that Whirlpool caused benzaldehyde to blanket the Clyde area and caused VOCs and other substances to be emitted into the ambient air in and around Clyde (Compl. ¶¶ 60, 155, 158), these allegations are insufficient to state plausible trespass claims. *See Pinares*, 2011 WL 240522, at *2 ("Plaintiffs make some allegations suggesting that some parts of the [surrounding neighborhood] may be contaminated, but the allegations fall short of actually

[18] Plaintiffs also fail to plead facts showing that Whirlpool reasonably could have foreseen that the materials it allegedly dumped or emitted would invade Plaintiffs' properties and cause substantial harm. *See Williams*, 659 N.E.2d at 382; *Chance v. BP Chems., Inc.*, No. 66622, 1995 WL 143827, at *2 (Ohio Ct. App. Mar. 30, 1995), *aff'd* 670 N.E.2d 985 (1996) (plaintiffs must plead "an intentional doing of the act which results in the invasion" and "reasonable foreseeability that the act done could result in an invasion of plaintiff's possessory interest").

alleging contamination of Plaintiffs' property."). Moreover, Plaintiffs' "blanket" allegation is refuted by testing completed by their own consultant and by Ohio EPA and the U.S. EPA. (*See* Compl. Ex. A at 9, 12 (reporting that benzaldehyde was not detected at the Clyde Water Treatment Plant); Ex. 3 at 3 ("Ohio EPA studied air quality for a full year in the Clyde and Green Springs area and detected no elevated levels of pollutants that would indicate a cause for public health risk concerns."); U.S. EPA, *Site Assessment Report for the Eastern Sandusky County Dumps Site*, June 29, 2012, at 20-27, attached as Ex. 10 (reporting above-RSL substances detected at 14 dump sites but not identifying benzaldehyde as one of them).) If Whirlpool's alleged burning activities actually caused benzaldehyde to "blanket" Clyde, Plaintiffs and the agencies should have found above trace levels at the city's water treatment plant (which is only 0.3 miles from one of the tested homes), in the ambient air, and at any of the Alleged Sites, but they did not.

Further, Plaintiffs fail to plead facts showing that the benzaldehyde found in certain Plaintiffs' homes (at levels far below the RSL) caused substantial damage to their properties or physical harm. (*See* Compl. ¶¶ 1-292.) Nor do they allege facts showing that Whirlpool is responsible for benzaldehyde's presence in their attic dust, as opposed to one of the many other, unsurprising reasons why benzaldehyde might be there. (*Id.*)

The Weiker Plaintiffs are similarly unable to assert a trespass claim because the Complaint is devoid of allegations enabling this Court to infer that Whirlpool is responsible for the presence of Teflon or other chemicals on their properties.[19] (*Id.*)

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[19] Given that the 12 Weiker Plaintiffs live at five different addresses, the fact that these barrels were found on the "Weiker property" is insufficient to give Whirlpool fair notice of where any trespass purportedly occurred. *See Energistica, S.A. v. Mercury Petroleum, Inc.*, No. 1:08CV-60-R, 2008 WL 5381907, at *4 (W.D. Ky. Dec. 22, 2008).

Finally, it has "long been the rule in Ohio" that a plaintiff must have been in possession of the subject premises at the time of the trespass in order to prevail. *Abraham*, 778 N.E.2d at 51 ("[A] plaintiff must prove that he or she had actual or constructive possession of the land at the time the trespass occurred."). Plaintiffs never allege facts showing that they possessed their properties at the time of the alleged trespass.

For these reasons, the Court should dismiss Plaintiffs' Fifth Claim for Relief.

### D. Plaintiffs Fail to Plead a Continuing Nuisance Claim for Wrongful Death and Personal Injury (Count 6)

Plaintiffs' Sixth Claim for Relief asserts that Whirlpool's "manufacturing process, including the disposal of chemicals constituted a continuing nuisance." (Compl. ¶ 239.) These allegations are insufficient even when liberally construed in Plaintiffs' favor.

#### 1. Plaintiffs Fail to State a Claim for Continuing Nuisance

Ohio recognizes that nuisances may be permanent or continuing. *Ashtabula River Corp. Grp. II v. Conrail, Inc.*, 549 F. Supp. 2d 981, 984 (N.D. Ohio 2008). "A continuing nuisance arises when the wrongdoer's tortious conduct is ongoing, perpetually generating new violations," and "a permanent nuisance occurs when the wrongdoer's tortious act has been completed, but the plaintiff continues to experience injury in the absence of any further activity by the defendant." *Kramer v. Angel's Path, L.L.C.*, 882 N.E.2d 46, 52 (Ohio Ct. App. 2007). It is "ongoing tortious conduct, and not merely recurring injury, that gives rise to a continuing nuisance or continuing trespass claim." *Yeager v. Carpenter*, No. 14-09-19, 2010 WL 3081441, at *6 (Ohio Ct. App. Aug. 9, 2010). To determine if there is a continuing nuisance, the court "may not consider whether the damage[] is ongoing or persists" but rather "must examine whether some ongoing tortious activity" exists. *Lally*, 615 F. Supp. 2d at 660; *e.g.*, *id*. at 661 (finding no continuing nuisance when all conduct ceased when the defendant sold its property); *e.g.*, *Ashtabula River*,

549 F. Supp. 2d at 985 (nuisance was not continuing where the complaint did not "refer to any recent polluting activities").

Here, Plaintiffs purport to bring a personal injury claim for "continuing nuisance." But they provide no factual support for their assertion that the alleged nuisance is "continuing" in nature, and, in fact, the Complaint suggests the opposite. (*See* Compl. ¶ 151 ("Witnesses claim that dumping of toxic materials was occurring at the Whirlpool Park up through the 1990s and up to the time it was sold."); *id.* ¶ 239 ("Whirlpool's manufacturing process . . . constituted a continuing nuisance." (emphasis added)); *id.* ¶ 282 ("Whirlpool operated its manufacturing process . . . in such a manner that it was a continuing nuisance." (emphasis added)).) Because Plaintiffs allege the dumping has ended and fail to assert that any improper VOCs emissions are ongoing, Plaintiffs' claim for "continuing nuisance" fails.

### 2. Plaintiffs Fail to Sufficiently Allege a Permanent Nuisance Claim

A "nuisance" is "the wrongful invasion of a legal right or interest," including the use and enjoyment of property. *Kramer*, 882 N.E.2d at 51; *see also Abraham*, 778 N.E.2d at 53 (a nuisance is "anything that obstructs the reasonable and comfortable use of property"). To be actionable, "the invasion must be either (a) intentional and unreasonable or (b) unintentional but caused by negligent, reckless, or abnormally dangerous conduct." *Kramer*, 882 N.E.2d at 52. Plaintiffs also must plead that their injuries were proximately caused by Whirlpool's conduct. *See Uland*, 1998 WL 123086, at *5. Even assuming that Plaintiffs intended to plead their "Continuing Nuisance" claim as permanent nuisance, that claim also fails as a matter of law.

First, Plaintiffs provide no facts from which this Court can infer that Whirlpool caused toxic substances to invade their properties. (*See* Argument, Parts II.B-II.C, *supra*.)

Second, a nuisance is limited to "conflicts between neighboring, contemporaneous land uses." *Abraham*, 778 N.E.2d at 53. Plaintiffs fail to plead when and where the alleged nuisance occurred and where they resided at that time.

Third, to maintain an action for nuisance, the damages must be "connected to the person's loss of use or loss of enjoyment of property." *Banford v. Aldrich Chem. Co., Inc.*, 932 N.E.2d 313, 317, 319 (Ohio 2010). Plaintiffs conclusorily allege that the "continuing nuisance has resulted in harm . . . by killing [certain] plaintiffs' children" and that, "[a]s a direct and proximate result of Whirlpool's continuing nuisance," Plaintiffs "sustained serious permanent personal injuries." (Compl. ¶¶ 240, 243.) Plaintiffs fail to allege facts showing that their injuries were caused by the alleged nuisance and "related to the use" of their property.

Fourth, Ohio divides nuisance into two categories: "An absolute nuisance is based on either intentional conduct or an abnormally dangerous condition that cannot be maintained without injury to property, no matter what care is taken," while a "qualified nuisance is essentially a tort of negligent maintenance of a condition that creates an unreasonable risk of harm, ultimately resulting in injury." *R.T.G.*, 780 N.E.2d at 1010.

An act is intentional "if (1) it is done willingly, and either (2) the actor desires the results of his conduct, or (3) the actor knows, or ought to know, the result will follow from his conduct." *Monsler v. Cincinnati Cas. Co.*, 598 N.E.2d 1203, 1207 (Ohio Ct. App. 1991). Here, the Complaint fails to allege facts showing that Whirlpool (a) disposed of any materials with the specific intent of harming Plaintiffs or with knowledge, at the time of the disposal, that its acts could cause the injuries allegedly experienced by Plaintiffs, or (b) created an abnormally dangerous condition that could not be maintained without injury to property. (*See* Argument, Parts II.A-II.C, *supra*.)

"A qualified nuisance is a lawful act 'so negligently or carelessly done as to create a potential and unreasonable risk of harm, which in due course results in injury to another.'" *Kramer*, 882 N.E.2d at 53 (citation omitted). Plaintiffs fail to allege facts showing how Whirlpool conducted its manufacturing processes in a negligent or careless manner and therefore fail to state a claim for qualified nuisance. Accordingly, the Court should dismiss Plaintiffs' Sixth Claim for Relief.

### E. Plaintiffs Fail to Plead a Loss of Consortium Claim (Count 16)

Although loss of consortium is "a legally separate and distinct cause of action," it is "derivative in that the claim is dependent upon the defendants having committed a legally cognizable tort upon the spouse [or child] who suffers bodily injury." *Bowen v. Kil-Kare, Inc.*, 585 N.E.2d 384, 392 (Ohio 1992). Because their primary claims fail, this Court should also dismiss Plaintiffs' Sixteenth Claim for Relief. *See Kerns v. Hobart Bros. Co.*, No. 2007 CA 32, 2008 WL 1991909, at *13 (Ohio Ct. App. May 9, 2008) (dismissing loss of consortium claim "[b]ecause we find that the primary cause of action . . . is properly subject to summary judgment"); *Lynn v. Allied Corp.*, 536 N.E.2d 25, 36 (Ohio Ct. App. 1987) ("The derivative cause of action for loss of consortium cannot provide greater relief than the relief permitted for the primary cause of action.").

## III. PLAINTIFFS' FRAUD CLAIMS DO NOT SATISFY RULE 9(B) (COUNTS 9 & 10)

To state a fraud claim, Plaintiffs must plead:

> (a) a representation or, where there is a duty to disclose, concealment of a fact, (b) which is material to the transaction at hand, (c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (d) with the intent of misleading another into relying upon it, (e) justifiable reliance upon the representation or concealment, and (f) a resulting injury proximately caused by the reliance.

*Cain v. Chesapeake Exploration, LLC*, No. 5:12CV1699, 2012 WL 3263792, at *2 (N.D. Ohio Aug. 9, 2012) (quoting *Burr v. Bd. of Cnty. Comm'rs of Stark Cnty.*, 491 N.E.2d 1101, 1105 (Ohio 1986)). These elements must be pled in accordance with Rule 9(b), which requires a plaintiff "(1) to specify the allegedly fraudulent statements; (2) to identify the speaker; (3) to plead when and where the statements were made; and (4) to explain what made the statements fraudulent." *Republic Bank & Trust Co. v. Bear Stearns,* 683 F.3d 239, 247 (6th Cir. 2012).

Here, Plaintiffs allege that Whirlpool "made a false statement of a material fact that it did not know of the presence of PCBs and other chemicals at Whirlpool Park and in producing pollution into the air that was not revealed to the Ohio EPA and others." (Compl. ¶¶ 255, 264; *see also id*. ¶ 149 ("Whirlpool has publically [*sic*] claimed that it did not know of the polluted soil at the park and that it must have been there when they bought the park.").) They also allege that Whirlpool "knew" that the statements were untrue but "intended to deceive" Plaintiffs and "the various governmental entities" and that Plaintiffs "justifiably relied" on the statements and were injured "[a]s a result." (*Id*. ¶¶ 256-60, 265-68.) These allegations fail to state a fraud claim.

First, the Complaint is silent regarding the identity of the speaker(s), when, where, or to whom the alleged statements or omissions were made, or why they were fraudulent. These deficiencies are significant given the 59-year timeframe during which the alleged conduct took place. *See U.S. ex rel. Piscitelli v. Kaba Ilco Corp.*, No. 1:11 CV 396, 2012 WL 6553274, at *4 (N.D. Ohio Dec. 14, 2012) (dismissing claim where "the plaintiff refers to a 34-year time span, but fails to identify even generally when the allegedly fraudulent statements were made").

Second, Plaintiffs conclude, without alleging any facts, that they "justifiably relied upon Whirlpool's statements and representations" and were injured "[a]s a result." (Compl. ¶¶ 258-59, 267-68.) But Plaintiffs must provide "more than labels and conclusions." *In re Heparin Prods.*

*Liab. Litig.*, No. 09HC60186, 2011 WL 3875361, at *2 (N.D. Ohio Sept. 1, 2011) (quoting *Twombly*, 550 U.S. at 555). Without allegations showing the statements made and when, it is impossible to know whether any Plaintiff reasonably relied on it or that reliance caused an injury. *See Boggs*, 2012 WL 3485288, at *6.

Third, the Complaint contains no facts from which the Court can infer that Whirlpool knew that any alleged statements or misrepresentations were false or made with the intent to deceive. *See Advocacy Org. for Patients & Providers v. Auto Club Ins. Ass'n,* 176 F.3d 315, 322 (6th Cir. 1999) ("[A]llegations of fraudulent misrepresentation must be made . . . with a sufficient factual basis to support an inference that they were knowingly made."); *e.g.*, *Roth v. Cabot Oil & Gas Corp.*, No. 3:12-CV-898, 2013 WL 358176, at *19 (M.D. Pa. Jan. 30, 2013) (dismissing claim where the plaintiffs pled "no facts" showing that the defendant's agent knew her representation about the safety of fracking was false); *Stalvey v. NVR, Inc*., No. 1:10 CV 1729, 2011 WL 3472385, at *4 (N.D. Ohio Aug. 9, 2011) (dismissing claim for failure to allege "any facts" in support of "conclusory allegations" that the defendants "knew or should have known" of a statement's falsity).

Fourth, to the extent that Plaintiffs' fraud claim is based on misrepresentations made to Ohio EPA, "various governmental entities," or "others" (Compl. ¶¶ 255, 257, 266), that claim fails as a matter of law. "[A] claim in fraud cannot be predicated upon statements or representations made to a third party." *Ayers v. City of Cleveland*, No. 1:12-CV-753, 2013 WL 775359, at *13 (N.D. Ohio Feb. 25, 2013); *see also Boggs*, 2012 WL 3485288, at *6.

Finally, to the extent that Plaintiffs intend to rely on a fraud-by-omission theory, they still fail to plead with particularity facts showing that Whirlpool had a duty to disclose anything. "The

failure to warn of potential contamination or exposure to dangerous chemicals, without more, is not actionable as fraudulent concealment." *Id.* Rather, Plaintiffs must allege with particularity:

> 1) the relationship or situation giving rise to the duty to speak; 2) the event or events triggering the duty to speak and/or the general time period when the relationship arose and fraudulent conduct occurred; 3) the general content of the information withheld and its materiality; 4) the identity of those breaching the duty to disclose; 5) what the defendant gained by withholding information; 6) why plaintiff's reliance on the omission was both reasonable and detrimental; and 7) damages proximately flowing from the reliance.

*Randleman v. Fid. Nat. Title Ins. Co.*, 465 F. Supp. 2d 812, 822 (N.D. Ohio 2006) (Carr, J.). Plaintiffs do not specify what Whirlpool failed to tell them, how their relationship with Whirlpool required any disclosure or what event triggered the need for disclosure, what Whirlpool gained by withholding this information, how Plaintiffs relied on the omission, or how they were damaged by it. *See Boggs*, 2012 WL 3485288, at *6 (dismissing concealment claim where the plaintiffs did not allege, with particularity, a "duty to disclose information to them," "what material facts should have been disclosed exactly," or "that the failure to disclose was intentionally meant to deceive the Plaintiffs"); *Randleman*, 465 F. Supp. 2d at 822 ("This requirement has not been met by the conclusory allegation that a duty to speak existed.").

## IV. PLAINTIFFS FAIL TO STATE CLAIMS FOR "LOSS OF PROPERTY VALUE" (COUNTS 11-15)

Plaintiffs' Eleventh through Fifteenth Claims for Relief—which seek "property loss" damages for negligence, strict liability, ultra-hazardous activities, trespass, and continuing nuisance—contain nearly identical allegations and assert that Whirlpool breached duties it owed to Plaintiffs and that those breaches "caused harm to plaintiffs' property or their property values" and "caus[ed] a significant loss of property values and stigma to the plaintiffs' property, for which Whirlpool is strictly liable." (*See, e..g.*, Compl. ¶¶ 269-83.) Each of these claims fails.

First, because Plaintiffs fail to state claims for negligence, strict liability, trespass, or nuisance, their claims for "loss of property values" fail as well. (*See* Argument, Part II, *supra*.)

Second, Ohio does not recognize "lost property value" as a recoverable measure of damages when the basis for the alleged diminution is environmental stigma. *See Ramirez v. Akzo Nobel Coatings, Inc.*, 791 N.E.2d 1031, 1034 (Ohio Ct. App. 2005) ("[P]ure environmental stigma, defined as when the value of real property decreases due solely to public perception or fear of contamination from a neighboring property, does not constitute compensable damages."). Damages are only recoverable if "there is actual, physical damage to a plaintiff's property." *Id*. at 1033; *see also Younglove Constr., LLC v. PSD Dev., LLC*, 782 F. Supp. 2d 457, 462 (N.D. Ohio 2011) (Carr, J.) ("Ohio courts have denied recovery for stigma damages . . . and have required that a plaintiff 'must show actual harm.'" (quoting *Ramirez*, 791 N.E.2d at 1034)). Here, Plaintiffs explicitly seek to recover damages for the alleged "stigma" to their properties (Compl. ¶¶ 271, 274, 277, 280), but fail to plead any facts showing that their properties in fact have been damaged or that any damages are connected to Whirlpool. (*See* Argument, Parts II.C-II.D, *supra*.) This dearth of facts is fatal. *See Pinares*, 2011 WL 240522, at *2 (dismissing property-loss claims where the plaintiffs merely concluded that contaminants had invaded their property).

The Court should dismiss Plaintiffs' Eleventh through Fifteenth Claims for Relief.

## V. PLAINTIFFS' PUNITIVE DAMAGES CLAIM IS LEGALLY DEFICIENT (COUNT 17)

Plaintiffs' Seventeenth Claim for Relief seeks punitive damages, but "punitive damages" is not a standalone claim under Ohio law. *See Niskanen v. Giant Eagle, Inc.*, 912 N.E.2d 595, 599 (Ohio 2009) (Ohio's punitive damages statute "prevents plaintiffs from bringing cases solely for an award of punitive damages" as "they are not independent remedies."); *Moskovitz v. Mt.*

*Sinai Med. Ctr.*, 635 N.E. 2d 331, 342 (Ohio 1994) ("[N]o civil action may be maintained simply for punitive damages."). Thus, the Court should dismiss the Seventeenth Claim for Relief.

**CONCLUSION**

For all these reasons, the Court should dismiss Plaintiffs' Complaint.

Dated: August 26, 2013

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I do hereby certify that, on this 26th day of August, 2013, a copy of the foregoing document entitled **Defendant Whirlpool Corporation's Memorandum in Support of Its Motion to Dismiss Plaintiffs' Second Amended Complaint** was filed electronically with the District Court. Notice of this filing will be sent to counsel for all parties by operation of the Court's electronic filing system.

*s/Michael T. Williams*
One of the Attorneys for Defendant
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